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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-5621

ALVIN LUCAS,

Petitioner,

v.

WISCONSIN ELECTRIC POWER COMPANY, a Wisconsin public utility corporation,

and

WILLIAM EICH, ARTHUR PADRUTT and MICHAEL KOMAR, individually and in their capacity as public service commission commissioners,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT WISCONSIN ELECTRIC POWER COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 22, 1972.

PETITION NOT PRINTED
RESPONSE NOT PRINTED
Eich, Padrutt & Ko

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DECISIONS BELOW

The Complaint in this case was dismissed by the United States District Court for the Eastern District of Wisconsin on December 16, 1970, in a decision reported at 322 F. Supp. 337. The Petition for Writ of Certiorari seeks review of the as yet unreported decision dated August 2, 1972, of the United States Court of Appeals for

the Seventh Circuit affirming the dismissal of the Complaint.

STATUTES AND REGULATIONS INVOLVED

In addition to the statutes mentioned by the Petitioner, the Johnson Act, 28 U.S.C. § 1342 is relevant. It reads as follows:

> "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State."

Petitioner's quotation from § 406.2(c) of Wisconsin Electric Power Company's filed

Rules and Regulations is incomplete and should read as follows:

"(c) When collection action is required, the following steps shall be taken:

1. A written notice shall be sent to the customer, stating the amount the customer is in arrears, and notifying him that service will be disconnected if such arrears are not paid within five days.

2. If the arrears remain unpaid at the end of the period specified on the disconnection notice and satisfactory arrangements for payment have not been made, service may be disconnected without further notice to the customer."

STATEMENT OF CASE

During the period relevant to this case Wisconsin Electric Power Company (Wisconsin Electric), a public utility, supplied certain electric service to Petitioner. Subsequently, it sent him a bill for such service. Petitioner claims that he paid the bill in cash without getting a receipt. Wisconsin Electric's records show no such payment. On June 30, 1970, Petitioner was notified by mail that unless he paid the amount due, electric service would be discontinued on July 6, 1970.

Following receipt of the notice, Petitioner made no attempt to discuss the matter further with Wisconsin Electric; nor did he attempt to take the matter up with the Public Service Commission of Wisconsin (the agency authorized by the State of Wisconsin to regulate public utilities); nor did he take injunctive action in State court; nor did he attempt to avail himself of any other remedy existing under Wisconsin law.

Instead, he commenced an action in the United States District Court for the Eastern District of Wisconsin, claiming to be the representative of a class comprised, apparently, of all Wisconsin Electric customers (at least those "similarly situated"). He asserted that the threatened disconnection of his electric service was action under color of State law which deprived him of rights protected by the Fourteenth Amendment of the United States

Constitution and by the Civil Rights Act of 1871 42 U.S.C. § 1983, absent a hearing of his claim to have paid all his bills and a decision on the merits by "an impartial decision maker." Electric service was continued to Petitioner pending the outcome of the litigation.

Subsequent to the decision of the Court of Appeals, counsel for Wisconsin Electric became aware of the following facts: On or about August 12, 1971, Petitioner ceased to be a customer of Wisconsin Electric, apparently moving his residence to the State of Kentucky. He left an unpaid balance with Wisconsin Electric of $36.13, $16.21 of which involved charges for electric service rendered subsequent to the commencement of the instant action. Counsel for Wisconsin Electric had no knowledge of any of this, but noted that newspaper accounts of the Court of Appeals decision, which was dated August 2, 1972, stated that Petitioner had moved to Kentucky. On August 14, 1972, Counsel wrote to Petitioner's Counsel asking whether the newspaper accounts were correct. Petitioner's Counsel subsequently confirmed the accuracy of the accounts. Petitioner returned to Milwaukee and applied for electric service on September 7, 1972. Wisconsin Electric thereupon informed Petitioner that he owed $36.13 for his previous use, and requested that he pay a $15.00 deposit. Petitioner ignored the request for deposit, did not pay the $36.13 owed, and made no effort to make credit arrangements with Wisconsin Electric, at which time Wisconsin Electric sent Petitioner a disconnection notice. In this

instance, however, the disconnection notice was sent because of Petitioner's failure to make the requested deposit, not because of the unpaid charges from the previous period.

WHY THE WRIT SHOULD NOT BE GRANTED

Respondent Wisconsin Electric Power Company respectfully submits that this case is not an appropriate one for the issuance of a Writ of Certiorari. The decision of the Court of Appeals applies well settled principles. There is no conflict among the circuits. Petitioner is deprived of no "property." The action of Wisconsin Electric in giving notice of intent to disconnect electric service was not "under color of state law" or otherwise subject to 42 U.S.C. § 1983. Petitioner has not been denied due process. The Johnson Act, 28 U.S.C. § 1342, forbids Federal court injunctions in cases such as this. Finally, the case has become moot.

I.

There Is No Conflict Among the Circuits

The decision of the Court of Appeals is in accord with Federal court decisions holding that normal business actions of public utility corporations do not constitute State action for purposes of civil rights litigation, even though such corporations may be subject to close State utility regulation. Kadlec v. Illinois Bell Telephone Co., 407 F. 2d 624 (7th Cir. 1969), cert. denied 396 U.S. 846 (1969). Martin v. Pacific Northwest Bell Telephone Company,

441 F. 2d 1116 (9th Cir. 1971), cert. denied 404 U.S. 873 (1971). In the case of Ihrke v. Northern States Power Company, 459 F. 2d 566, 570 (8th Cir. 1972) vacated U.S. Case No. 72-28 (Oct. 10, 1972), cited by Petitioner to demonstrate conflict among the circuits, an entirely different case was presented. There the Court concluded that a utility regulated by a city was engaged in "state action" in disconnecting customers for nonpayment of bills pursuant to a city approved regulation permitting such action. In so holding, however, the Court placed great emphasis upon the fact that the city was paid a franchise fee of 5% of every dollar collected by the utility and that the city was "obviously the direct beneficiary" of the utility's collection procedures. There is no gross receipts tax or franchise fee involved in the instant case, although Wisconsin Electric (like other Wisconsin utilities) is subject to assessment by the Public Service Commission of Wisconsin for the cost of regulation. Wis. Stat. § 196.85. Further, by Order dated October 10, 1972, this Court granted a Petition for a Writ of Certiorari, vacated the Judgment and remanded the Ihrke case to the Court of Appeals for the Eighth Circuit "with instructions to dismiss the case as moot." This procedure considerably lessens the precedential force of the Ihrke case, as well as that of Jackson v. Northern States Power Company, 343 F. Supp. 265 (D. Minn. 1972) which relied on Ihrke and which is cited by Petitioner.

The other cases cited by the Petitioner to demonstrate a conflict among the circuits are all district court decisions. They are, of course, subject to review in their respective circuits and thus do not necessarily represent the views of the Courts of Appeal.

II.

Petitioner Is Deprived Of No Property

Central to the claim by Petitioner that the challenged disconnection procedure deprives him of his property without due process of law is the assumption that some "property", or at least possession thereof, is involved. In this case, the property (electricity), to the extent that it exists prior to receipt and consumption by the Petitioner, is within the possession and ownership of Wisconsin Electric. By the injunction sought in this proceeding, Petitioner seeks to require that Wisconsin Electric continue to turn over its property to him. In this respect, the case is quite unlike such cases as Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969) and Fuentes v. Shevin, 407 U.S. 67 (1972), in which cases the debtor's own property or his presumptively valid possession of property was the target of a creditor-initiated legal proceeding. The instant case is, further, different from those cases in which the State itself is attempting to revoke a right or privilege which it has itself

granted as a matter of law, such as in Goldberg v. Kelly, 397 U.S. 254 (1970); Bell v. Burson, 402 U.S. 535 (1971); and Speiser v. Randall, 357 U.S. 513 (1958). The State has no Fourteenth Amendment rights but Wisconsin Electric and its owners do.

III.

No "State Action" Is Involved

The Civil Rights Act of 1871, 42 U.S.C. § 1983, is not applicable in the absence of "state action." When Wisconsin Electric disconnects a customer who has not paid his bill, it is exercising a right which it and its predecessors possessed at common law long before the existence of utility regulation. The regulations of the Public Service Commission of Wisconsin cited by the Petitioner have in no way created or expanded this right. Quite the reverse, the Commission regulations impose restrictions upon the pre-existing right of utilities to disconnect service. The Commission in no way participates in the disconnection process as such. When Wisconsin Electric disconnects a customer for nonpayment, it in no way acts as the agent of the State. It uses no warrant or writ and exercises no State given power. It acts for itself in the same fashion as does any other private provider of goods or services who decides not to provide any more to a particular customer until the

customer's outstanding bills are paid. (Cf. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172-76 (1972).

The so-called "monopoly" (an opprobrious term which overstates reality) status of an electric utility does not alter these circumstances. An electric utility in Wisconsin is severely restricted in the range of conduct in which it may engage, but the nature of its closely regulated relationship with each of its customers remains essentially contractual. A contract with a "monopolist" remains no more than a contract and per se confers no rights upon either of the contracting parties beyond those provided for in the contract itself. If a "monopolist" violates his contract, adequate recourse exists under State law for injunctive relief, specific performance, damages or other appropriate remedy. Violation of a contract (which is what unjustified disconnection of electric service would amount to) does not involve a taking of property without due process of law even when a "monopolist" is the violator.

IV.

Petitioner Was Not Denied Due Process

Petitioner had available to him a whole arsenal of remedies under Wisconsin law at the time he received his notice of disconnection.

He could have discussed the matter with Company officials and could have presented to them his arguments concerning whether he owed the bills in question. He could have presented his arguments to the Public Service Commission of Wisconsin and could have obtained the assistance of that agency, which has general regulatory authority over Wisconsin Electric. He could have commenced a State court injunction proceeding to preserve the status quo while litigating the validity of his defenses to the claim. He chose to do none of these. Resort to any of them would have provided Petitioner with an opportunity to present his arguments prior to the actual disconnection of service. In addition, Petitioner could have paid the disputed bill under protest and could have sued in the State court for a refund, during which proceeding his claims would, of course, have been litigated. Or he had the option to allow the disconnection to occur, then to sue Wisconsin Electric for whatever damages he suffered from the disconnection.

In cases like this (as in any other instance in which a small amount of money is involved) individuals may choose to forego their rights or to refrain from taking appropriate legal action and to pay an amount they do not really believe they owe, to avoid a disconnection, because the amount in dispute does not justify the expense of litigation or administrative review. But a person obviously has no greater due process rights in cases involving small amounts in dispute than he would have if

the amounts were greater. If the amount in dispute in this case were $10,000, instead of less than $20, no one would seriously take the position that the procedures involved resulted in any taking of property without due process, in view of the minimum five day notice which must be given to a customer prior to any actual disconnection. This time period clearly meets the requirements of due process by permitting a customer who believes that the threatened disconnection is unjustified adequate time to resort to available legal procedures, if that is his desire. As the Court of Appeals noted in this case:

> "Even if no more than the five days prescribed by rule were involved, he [Petitioner] had adequate time in which to forestall termination by seeking informal review, by paying the arrearage under protest, or even by filing suit in a state court. (He did, after all, have time to file this federal suit.) There can be no serious quarrel with the timing of the Company's notice." (A. 21)

V.

The Johnson Act, Comity and Abstention

Under the Johnson Act, 28 U.S.C. § 1342, district courts are forbidden to

"enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, . . ." where four separate criteria are satisfied. These criteria are satisfied in this instance in that (1) jurisdiction in the case is based upon alleged repugnance of a State administrative order to the Federal Constitution; (2) the State agency order does not in any way interfere with interstate commerce; (3) the order in question was made after reasonable notice and hearing (See In Re Guarantee and Deposit Rules and Disconnect Procedure, 11 Wis. Pub. Serv. Comm'n. 24 (1935); and (4) several plain, speedy and efficient remedies (discussed above) may be had in this case in the courts of Wisconsin.

The Johnson Act has been found to be applicable to a suit challenging the constitutionality of a telephone company's deposit requirements. David v. New York Telephone Company, 341 F. Supp. 944 (S.D.N.Y., 1972).

Further, this is a case in which considerations of comity and abstention militate against involvement of the Federal courts. See e.g.: Railroad Commission of Texas, et al. v. Pullman Company, 312 U.S. 496, 500 (1941).

VI.

The Case Appears To Be Moot

When Petitioner moved to Kentucky from Wisconsin Electric's service area in August, 1971, he ceased, of course, to take electric service from Wisconsin Electric. As a result, the very action (i.e., disconnection of electric service) against which Petitioner sought the injunction in this case, and the very action which Petitioner insisted not occur prior to a hearing before "an impartial decision maker" on the merits of his payment claim, has occurred by his own voluntary act. At the instant Petitioner ceased to take electric service, the case became moot, and no further justiciable controversy existed. See Northern States Power Company v. Ihrke, et al., U.S. Case No. 72-28 (Oct. 10, 1972).

The fact that Petitioner returned to Wisconsin Electric's service territory in September, 1972, (more than a month after the decision of the Court of Appeals in this case) did not have the effect of reviving the controversy in this proceeding. Wisconsin Electric no longer threatens to disconnect Petitioner's electric service because of his 1970 bills. It does, however, threaten to disconnect his service currently because of his failure to pay a deposit which has been requested, but this is a different story. See Particular Cleaners, Inc. v. Commonwealth Edison Company, 457 F. 2d 189

(7th Cir. 1972), cert. denied 41 U.S.L.W. 3170 (Oct. 10, 1972).

CONCLUSION

For the foregoing reasons, Respondent Wisconsin Electric respectfully submits that the Petition for a Writ of Certiorari does not present an issue appropriate for resolution by this Court. The Petition should be denied.

Respectfully submitted,

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November 22, 1972.